THE VIETNAM WAR UNDER THE CONSTITUTION: LEGAL ISSUES INVOLVED IN THE UNITED STATES MILITARY INVOLVEMENT IN VIETNAM

by
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The question of the legality of the Vietnam conflict has been the subject of a continuing debate. The legality of American military involvement in Southeast Asia has been challenged under international law, and the constitutionality of such involvement has been challenged under domestic law. This Article deals with the latter challenge. The author outlines the arguments on both sides of the question whether the executive branch has exceeded the limits of its constitutional authority in committing the nation to war. Following an analysis of the arguments, the author concludes that the executive has committed the nation to war without valid congressional authorization, thereby exceeding its constitutional authority. The author closes with a call for an effective congressional reassertion of its constitutional power to control the use of force in foreign affairs.—The Editors.

INTRODUCTION

There has been much criticism of the various aspects of American policy in Vietnam. The two major areas of controversy concern the position of the United States under international law, and the constitutionality of the executive's actions in committing the nation to war.[1] This essay reviews the fundamental constitutional arguments and analyzes their merits. Finally, the status of domestic law in relation to, and as a result of, the executive's policy in Vietnam is considered. The constitutional issue is a viable topic today, despite the expiration of the Johnson Administration. The validity of this proposition is supported by the recent decision of the Senate Foreign Relations Committee to hold renewed hearings on the Vietnam war.[2]

The Nixon administration is now responsible for the executive policy in Southeast Asia, notwithstanding the fact that it did not initiate that policy. Thus, what follows is not a personalized debate involving one president and his administration, but rather an analysis of the constitutional issue, centering around the conflict between the congressional war powers and the President's responsibilities as

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1. THE VIETNAM WAR AND INTERNATIONAL LAW (R. Falk ed. 1968). For a short statement of the problems involving the Constitution, *see*, Andonian, *Law and Vietnam*, 54 A.B.A.J. 457 (1968). For a recent study on the specific question of the constitutionality of Executive actions relating to Vietnam, *see*, M. PUSEY, THE WAY WE GO TO WAR, (1969).

2. N.Y. Times, Oct. 5, 1969, at 24, col. 5. The hearings were held in February, 1970.

Commander-in-Chief, with specific reference to the initiation of a war in Southeast Asia.

This analysis is presented in four parts: the government's arguments; an anti-administration rebuttal; an analysis of the arguments; and finally, a conclusion placing the results of the analysis in constitutional and historical perspective. The original source in the presentation of the government arguments is the Memorandum of the Legal Advisor to the State Department.[3] The first section is organized in strict adherence to the Memorandum of the Legal Advisor; thus, constant reference to his positions will necessarily follow in both the rebuttal and the analysis.

PART ONE: THE GOVERNMENT'S ARGUMENTS

The President's policy in Vietnam is, without question, legal under domestic law. The executive's actions are constitutionally valid on not one, but three bases. The grant of presidential powers under Article II of the Constitution authorizes his conduct as Commander-in-Chief. Article VI of the Constitution (the treaty power) and the SEATO Treaty together provide an additional source of executive power further justifying executive action with respect to the Vietnamese conflict. Finally, the President's policy has been authorized by Congress. The Joint Resolution of August 10, 1964, delegated to him the power to carry on the Vietnam war, and subsequent appropriation acts have ratified the President's actions and have continually given him a renewed Congressional mandate.

I. POWERS OF THE PRESIDENT

A. Historical Precedent

The controversy over the powers of the President is centered on the

3. Department of State, Office of the Legal Adviser, *The Legality of United States Participation in the Defense of Vietnam*, 54 U.S. DEPT. OF STATE BULL. 474 (1966) [Hereinafter cited as *Memorandum*]. *See also: National Moot Court Brief (Administration Arguments on United States' Involvement in Vietnam Under Constitutional and International Law)*, 6 HOUSTON L. REV. 544 (1969).

For a recent statement arguing against the constitutionality of United States involvement in Vietnam, *see* M. PUSEY, *supra* note 1, at 1-2, 12, where it is stated:

> The President sends American troops to any part of the world—whenever he thinks they may be needed in the national interest. Three times in the last quarter century one man in the White House has taken the United States into war. . . . In defense of these historic acts the executive branch has laid claim to 'inherent powers' broad enough to determine the fate of the nation in any future crisis. . . . The result is an executive—legislative clash which may evolve into the most important constitutional contest of this century. . . . At last there is hope that the storm brewed by the Tonkin Gulf resolution will force a nationwide reexamination of the way we go to war.

critics' claim that the sole power to "make war" belongs to Congress. This is true neither in theory nor in practice. The framers of the Constitution specifically rejected the total limitation of executive powers. While Congress alone could "declare war", the framers agreed to allow the Executive certain powers in order to repel sudden attacks.[4]

Article I, Section 8, Clause 11 of the United States Constitution grants Congress the power to declare war. The Constitution's use of the phrase "to declare war" should not be equated to the phrase "to make war". The use of the phrase "to declare war" by the drafters evidenced an intention to reserve to the Executive the inferred power to make war or engage in war, in order to exercise the international legal right of self-defense. The power to act in self-defense is based upon Article II, Section 2, Clause 1, which mandates that "the President shall be Commander-in-Chief of the Army and Navy of the United States . . ." This power has been interpreted broadly throughout history.[5] In effect:

> The Constitution leaves to the President the judgment to determine whether the circumstances of a particular armed attack are so urgent and the potential consequences so threatening to the security of the United States that he should act without formally consulting the Congress.[6]

Historical precedent has confirmed this view of the executive's power to make war.[7] The President generally has had the authority to deploy American troops around the world at his own discretion:

> Since the Constitution was adopted there have been at least 125 instances in which the President has ordered the armed forces to take action or maintain positions abroad without obtaining prior Congressional authorization, starting with the "undeclared war" with France (1798-1800).[8]

B. Powers Under Article II

Article II states: "The executive power shall be vested in a President of the United States of America (Section 1, Clause 1). . . . The President shall be Commander-in-Chief of the Army and Navy (Section 2, Clause 1). . . . He shall have Power . . . to make treaties

4. *Memorandum, supra* note 3, 484.

5. "History thus reveals that while Congress in theory possesses the power to engage the United States in war, the President, in practice, exercises that power." R. HULL and J. NOVOGROD, LAW AND VIETNAM (1968) at 172 [Hereinafter cited as HULL and NOVOGROD].

6. *Memorandum, supra* note 3, at 485.

7. "Indeed precedent reveals that the Commander-in-Chief's power is not limited to the case of an armed attack." HULL and NOVOGROD at 170. "In short, precedent establishes that, in effect, Congress has delegated substantial military powers to the President." *Id.* at 171.

8. *Memorandum, supra* note 3, at 484.

(Section 2, Clause 2). . . ." According to the Legal Advisor: "The grant of authority to the President in Article II of the Constitution extends to the actions of the United States currently undertaken in Vietnam."[9] This authority is found in the President's foreign policy powers, his powers as Chief Executive, and his role as Commander-in-Chief of the Army and Navy.

It is generally acknowledged that the President directs the nation's foreign policy. He exercises leadership in areas of political, diplomatic, economic, financial, and commercial international relations. Responsibility for American foreign policy includes the power to negotiate executive agreements that have the binding effect of treaties; furthermore, custom and usage affirm this practice without the necessity of Congressional ratification.[10] As the Chief-of-State, the President receives foreign ambassadors. The nation's leading diplomatic strategist necessarily has broad powers in shaping foreign policy, often embracing questions of war and peace.

Under Article II, the President is also the Chief Executive of the United States. His appointive and removal powers lend him certain controls over policy making. He is the executive in charge of the huge federal bureaucracy, including military and military-related bureaucracies. In this area, President Franklin D. Roosevelt enjoyed broad executive powers prior to and during World War II. The Selective Service Act gave the President the power to raise an army, formerly thought to be a strictly legislative function. With the Lend-Lease Act (1941), Congress delegated more legislative power to the Chief Executive.[11]

The Commander-in-Chief clause is probably the most important constitutional source of the President's war powers. The Commander-in-Chief formulates and administers military strategy. "These duties carry very broad powers, including the power to deploy American forces abroad and commit them to military operations when the President deems such actions necessary to maintain the security and defense of the United States."[12] It has already been noted that an abundance of historical precedent confirms this practice under the Constitution. Even if the initial intent of the drafters of the Constitution in 1787 was not to allow the President the power to deploy forces into combat in self-defense, historical precedent has confirmed

9. *Id.*
10. U.S. v. Belmont, 301 U.S. 324 (1937).
11. HULL and NOVOGROD at 173.
12. *Memorandum, supra* note 3, at 484.

an evolution of the President's power to do these acts. Today, the President has the ultimate responsibility to defend the nation against armed attacks and to maintain the national security.[13]

II. THE SEATO TREATY

The President's actions in Vietnam are also justified under Article VI, Section 2 of the Constitution: "[A]ll treaties made or which shall be made under the Authority of the United States, shall be the supreme Law of the Land." The United States agreed in the SEATO Treaty, in Article IV, paragraph 1, that an armed attack in the treaty area, specifically including South Vietnam, would endanger the peace and safety of the United States. In that same paragraph the United States affirmed it would "act to meet the common danger *in accordance with its constitutional processes*", and the SEATO Treaty was overwhelmingly approved by the United States Senate in 1955 by a vote of 82-1.[14]

Under Article VI of the Constitution, the SEATO Treaty has the authority of the supreme law of the land. Under Article II of the Constitution, the Chief Executive has the responsibility to execute the laws faithfully. As Commander-in-Chief, the President must exercise discretion in judging whether or not there has been an armed attack as described in the Treaty. Following an affirmative determination in this regard, he must then decide the proper response in accordance with the Treaty obligations and his constitutional responsibilities:

> If he considers that deployment of U.S. forces to South Vietnam is required, and that military measures against the source of Communist aggression in North Vietnam are necessary, he is constitutionally empowered to take those measures.[15]

Without question then, the Executive's conduct is in accord with Article II and Article VI of the United States Constitution.

III. CONGRESSIONAL AUTHORIZATION

Congress has expressed its approval of the President's determination to defend South Vietnam, and to prevent communist aggression. The

13. The dilemma of the atomic age has redefined the constitutional role of the executive: But when it comes to action risking war, technology has modified the Constitution: the President perforce becomes the only such man in the system capable of exercising judgment under the extra-ordinary limits now imposed by secrecy, complexity and time. NEUSTADT, PRESIDENTIAL POWER 187-88 (1964) [Hereinafter cited as NEUSTADT].

14. Southeast Asia Collective Defense Treaty, September 8, 1954, 6 U.S.T..81, T.I.A. S. 3170. E. GRUENING and H. BEASER, VIETNAM FOLLY 133 (1968) [Hereinafter cited as GRUENING and BEASER].

15. *Memorandum, supra* note 3, at 485.

Tonkin Gulf (Joint) Resolution and subsequent Vietnam appropriations together constitute clear congressional authorization and ratification of the President's actions in Vietnam.

A. The Tonkin Gulf Resolution

Within a few days after the Administration reported the Tonkin Bay incidents, Congress passed the Joint Resolution by a nearly unanimous vote. Section 1 of that Resolution may be interpreted as a mere statement of Congressional support for the President's immediate policy and his retaliation against North Vietnam. However, Section 2 extends a definite grant of authority to the President, clear in meaning and broad in its delegation of power. This section's message is stated in very precise language:

> The United States regards as vital to its national interest and to world peace the maintenance of international peace and security in Southeast Asia. Consonant with the Constitution of the United States and the Charter of the United Nations, and in accordance with its obligations under the Southeast Asia Collective Defense Treaty, the United States is, therefore, prepared, as the President determines, to take all necessary steps, including the use of armed forces, to assist any member or protocol state of the Southeast Asia Collective Defense Treaty requesting assistance in defense of its freedom.[16]

It should be understood that South Vietnam is identified in the Resolution by the term "protocol state". A careful reading of this vital section leaves no doubt as to the powers therein delegated to the President by the Congress. On August 7, 1964, the House of Representatives voted 416-0, and the Senate, which previously had decisively ratified the SEATO Treaty by a similar margin, voted 88-2 in favor of the Resolution.[17] In the words of Eberhard Deutsh, chairman of the American Bar Association's Committee of Peace and Law through the United Nations, the Resolution amounted to "undoubtedly the clearest and most unequivocal congressional sanction of . . . [The President's position]."[18] This congressional sanction is continuing in nature. The last section (Section 3) of the Tonkin Resolution provides for its termination by the President, or by a concurrent resolution of Congress. The President has not called for its expiration, nor has Congress acted to do so.

16. *Id.* at 486.

17. *Id.* at 485.

18. Deutsch continues: ". . . the resolution authorizes the President 'to make way,' it surely has the same effect as a Congressional 'declaration of war' in haec verba would have had." Deutsch, *The Legality of the United States' Position in Vietnam*, 52 A.B.A.J. 436, 441 (1966).

In the years since its passage, there has been considerable debate over the meaning and effect of the Joint Resolution. Certainly, justification for the debate cannot be found in the unequivocal language of the Resolution nor is the magnitude of its support. Perhaps then the legislative history of the Tonkin Gulf Resolution is responsible for this controversy. One account, however, is rather skeptical.

> The Congressional debates are not very instructive in revealing the cause of this confusion. Indeed the debates appear to demonstrate that the supposed confusion is somewhat manufactured, for the dissenting Senators, Morse and Gruening, were quick to point out that the resolution would give the President unfettered power.[19]

The obvious meaning of the Joint Resolution cannot be denied. Its overwhelming support is registered in the Senate and House vote. Thus it must be construed as manifest Congressional authorization of the President's actions.

B. Congressional Appropriations

Not only has Congress refused to terminate the Tonkin Gulf Resolution, but it has also repeatedly passed appropriation bills in support of the President's policy. The first was in May, 1965, when Congress passed an appropriation of $700 million for the Vietnam war.[20] In his message to Congress, the President described this legislation as a definite authorization for the war effort. "For each member of Congress who supports this request is also voting to persist in our efforts to halt Communist aggression in South Vietnam."[21]

Congressional support continued with the approval of a $4.8 billion supplemental appropriations bill by another overwhelming vote on March 1, 1966.[22] Authorization through appropriations has continued without interruption every year. For example, Congress again decisively passed appropriations, and simultaneously rejected amendments that would limit their authority, with the Military Procurements Bill of 1967.[23] "The Appropriations Act constitutes a clear congressional endorsement and approval of the actions taken by the President."[24] This endorsement has been annually renewed.

19. HULL and NOVOGROD at 176-77.
20. *Memorandum, supra* note 3, at 487.
21. *Id.*
22. *Id.*
23. HULL and NOVOGROD at 183-84.
24. *Memorandum, supra* note 3, at 487.

PART TWO: REBUTTAL

In clarifying the issue of the executive's war policy in relation to our duly prescribed constitutional processes, it is best to begin by placing the question in the broader perspective of our constitutional system:

> The doctrine of "separation of powers" is fundamental to, and one of the great structural principles of, the American constitutional system. The President cannot in wartime, any more than he can in times of peace, intrude upon the authority of Congress. Nothing is plainer than the proposition that the power to declare war is entrusted to Congress alone.[25]

The fundamental proposition then is that Congress alone possesses the constitutional power to declare war.

The justification by the executive branch of the government for its initiation of the war is expressed in the Legal Advisor's Memorandum to the State Department. Included are several interesting notions: that Article II of the Constitution gives the executive sweeping powers, validated through numerous historical precedents; that the SEATO Treaty pursuant to Article VI obligates the United States to engage in war; that the Tonkin Gulf Resolution, along with appropriation bills, constitutes Congressional authorization for the President's war policies; thus, no Congressional declaration of war pursuant to Article I, Section 8, Clause 11 was necessary. These arguments will now be shown to be foundationless attempts to nullify the vital section of the Constitution which places the power "to declare war" in the legislative branch of the United States government.

I. POWERS OF THE PRESIDENT

A. Historical Precedent

A major argument presented in support of the executive's position is founded on the claim of justification through historical precedent. The Memorandum alleged 125 incidents in American history involving the executive deployment of armed forces without prior Congressional authorization.[26] However, in compiling and presenting this list of precedents, the Legal Advisor demonstrated an overzealous tendency to rewrite history. He begins boldly: "History has accepted the interpretation that was placed on the Constitution by the early

25. Faulkner, *The War in Vietnam: Is It Constitutional?* 56 GEO. L.J. 1132, 1134 (1968).
26. *Memorandum, supra* note 3, at 484.

Presidents and Congresses (and one must add, the Courts and the framers themselves. . . ."[27]

The first precedent for alleged executive initiations of war is mislabled the "undeclared war" with France that occurred at the end of the Eighteenth century. But in initiating that war, President John Adams had not taken action independently of Congress. A series of legislative acts,[28] in accordance with Congress' war powers, authorizing hostilities, amounted to a declaration of imperfect or limited war. This was established in Supreme Court rulings dealing with war claims. In *Bas v. Tingey*,[29] the fact of Constitutional processes was reaffirmed. Justice Chase said, "Congress is empowered to declare war or Congress may wage a limited war; limited in place, in object, in time. [This was done as] Congress has authorized hostilities on the high seas by certain persons in certain cases."[30] According to Justice Patterson, "Congress tolerated and authorized the war on our part."[31]

A second court ruling legitimizing congressional authorization of the limited belligerency that had occurred in the war with France, was *Talbot v. Seeman*.[32] In the words of Chief Justice John Marshall:

> The whole powers of war being, by the Constitution of the United States, vested in Congress, the acts of that body can alone be resorted to as our guides in this inquiry. It is not denied . . . that Congress may authorize general hostilities . . . or partial war, in which case the laws, so far as they actually apply to our situation, must be noticed.[33]

Thus, the first of the list of 125 historical precedents cited by the State Department's Memorandum did not involve independent executive action, and therefore did not support the Legal Advisor's general proposition that there has been an evolution in the war-making power under the Constitution, or that history has evidenced an intent of the drafters of the Constitution to allow the President to make war.

The State Department's remaining precedents fall largely into two categories: interventions for the protection of citizens, and measured acts of reprisal. The vast majority falls into the former classification. Such relatively minor and short-lived occurrences do not establish precedent for the massive and long-lasting war still raging in Southeast

27. *Id.* at 488.

28. F. WORMUTH, THE VIETNAM WAR: THE PRESIDENT VERSUS THE CONSTITUTION 6-7 (1968). [Hereinafter cited as WORMUTH].

29. 4 U.S. (4 Dall) 37 (1800).

30. *Id.* at 43.

31. *Id.* at 45.

32. 5 U.S. (1 Cranch) 1 (1801).

33. *Id.* at 28.

Asia.[34] These war policies decidedly are not landings to protect citizens nor are they mere acts of reprisal.[35] It was conceded by Under-Secretary of State Katzenbach that "most of these were relatively minor uses of force."[36] Thus, they cannot provide precedent for the tragically dissimilar circumstances engulfing North and South Vietnam.

A precedent may appear to exist with the Korean War, in which President Truman acted without congressional authorization. He claimed authorization from the vote of the United Nations Security Council. Of course the U.N. cannot declare war for America, and Congress so stipulated in the United Nations Participation Act in 1945, reaffirming the constitutional prerogative of Congress to make the decision whether to go to war.[37] Therefore, the Korean War appears to have been initiated by independent executive action.

The existence of the Korean precedent however does not serve to validate the current war. Illegal precedents do not validate illegal actions. In litigation[38] during the Korean War involving the President's seizure of steel mills, the government claimed that President Truman had that power due to several precedents. According to Lawrence Velvel:

> The Supreme Court replied, however, that even if other Presidents had seized private industries, Congress had not hereby lost its exclusive power to make the laws, and the seizure of the steel mills was a legislative act. So it is in this case. Even if Presidents have used force without a declaration of war, Congress has not thereby lost its exclusive power to declare war.[39]

The Memorandum conceded that the framers chose the phrase "to declare war" instead of "to make war" for the purpose of "leaving to the Executive the power to repel sudden attacks".[40] It is alleged by the Memorandum that the President becomes the judge of the circumstances of urgency and the threat to national security, in determining if he may act without consulting Congress.[41]

It is difficult to justify the President's actions, even assuming the

34. *See* WORMUTH at 27.

35. *Id.* at 32.

36. *National Commitments Hearings*, 81, cited in Velvel, *The Vietnam War: Unconstitutional, Justiciable and Jurisdictionally Attackable*, 16 KAN. L. REV. 449, 468 (1968) [Hereinafter cited as Velvel].

37. WORMUTH at 27-28.

38. Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (1952).

39. Velvel, *supra* note 36, at 470.

40. *Memorandum, supra* note 3, at 484.

41. *Id.* at 485.

validity of this allegation. President Johnson offered no circumstances of such urgency that, prior to February 7, 1965, (the day he authorized the bombing of North Vietnam he was unable to consult Congress. He cited no circumstance of military emergency imperiling the United States or its armed forces. Thus: "Even by the standard of the State Department's generous definition of the powers of the President, Johnson usurped the war power of Congress."[42]

One war that was unconstitutionally initiated by the executive was the Mexican War of 1846-48. President Polk was rebuked by the House resolution of January 3, 1848, which stated the war was "unnecessarily and unconstitutionally begun by the President of the United States."[43] In a letter to a friend, Representative Abraham Lincoln explained his interpretation of that constitutional issue:

> The provision of the Constitution giving the war-making power to Congress was dictated, as I understand it, by the following reasons: Kings had always been involving and impoverishing their people in wars. . . . This our convention understood to be the most oppressive of all kingly oppressions, and they resolved to so frame the Constitution that no one man should hold the power of bringing oppression upon us.[44]

The importance of the declaration of war was shown quite clearly in the above quoted correspondence of Lincoln. It is a constitutional mandate which prevents oppression by a small group of men in the executive branch. It disperses the power to make that critical decision over the collective judgment of the 535 men who share the responsibility at the Capitol.

The contention of the executive branch that no declaration of war is necessary is merely an argument to nullify vital parts of the Constitution. Unconstitutional history has demonstrated the vitality of the Congressional declaration of war, and that the declaration may be for general or limited hostilities. This description summarizes the issue's contemporary relevance:[45]

> Thus if a declaration of general war is undesirable today, the Congress has the power to declare a limited war, stating what the limited objectives are, setting limits on the amount of force that can be used to achieve those objectives and, if Congress wishes, putting time limits on the period during which force can be

42. WORMUTH at 5.

43. CONG. GLOBE, 30th Cong., 1st Sess. 95 (1848), cited in WORMUTH at 11.

44. 1 THE WRITINGS OF ABRAHAM LINCOLN 51-52 (A. LAPSLEY ed. 1905), cited in WORMUTH at 11.

45. Velvel, *supra* note 36, at 462. The international legality of a limited congressional declaration of war under the Constitution may be questioned under the United Nations Charter. U.N. CHARTER art. 52.

> used. This Congressional power stems . . . from Congress' power to declare war. It can also be traced to Congress' power to raise armies and provide navies[46] and to its power to make rules regulating the armed forces.[47]

B. Powers Under Article II

The executive branch claims sweeping constitutionally-derived executive powers. Included in Article II of the Constitution are the foreign policy powers of the executive (Section 2), the Chief Executive clause of the Constitution (Section 1), and the Commander-in-Chief clause (Section 2).

The Legal Advisor places much reliance on the President's foreign policy power granted by Article II. But Congress too has many significant foreign policy powers which require an active role in foreign affairs. With the power to raise armies and navies, Congress has much to say about the extent of the use of these instruments of war. The congressional rule-making power over the military gives Congress the power to enact rules for the employment of the armed forces in warfare.[48] But the argument over foreign policy power misses the point. One must turn to the fundamental issue. That is, "regardless of whether the Constitution makes the Executive supreme in the field of foreign affairs, it specifically makes Congress supreme in the matter of declaring war."[49]

In the *Youngstown* case,[50] the Supreme Court dealt with the President's power as Chief Executive. It was stated that the President may execute acts Congress has passed, but he may not usurp powers clearly in the legislative domain. In his concurring opinion, Justice Jackson stated:

> I cannot accept the view that this clause is a grant in bulk of all conceivable executive power but regard it as an allocation to the presidential office of the generic powers thereafter stated.[51]

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46. U.S. CONST. art. I, § 8, cited in Velvel, *supra* note 36, at 462.

47. Velvel, *supra* note 36, at 462.

48. *Id.* Robert Dahl concluded:

> [T]he conclusion is unavoidable that the national legislature, as it now plays its exacting role on the political stage, is remarkably ill-suited to exercise a wise control over the nation in foreign policy. . . . [O]ne should explore ways of dealing with foreign policy that would relieve Congress wholly or in part of its responsibilities. . . ." DAHL, CONGRESS AND FOREIGN POLICY 3-5 (1959).

The Premise of this essay is opposite to the above; it is the executive's power that must be limited and the foreign policy powers of Congress that must be increased.

49. Velvel, *supra* note 36, at 458.

50. Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (1952).

51. *Id.* at 642.

The Commander-in-Chief clause, along with the other executive powers in Article II of the Constitution, has been the basis for the claim of broad powers, including the power to take military measures at executive discretion. This is a misinterpretation of the Constitution. As Commander-in-Chief, the President is the top ranking military officer in the nation. However, the Constitution places the power to declare war not with the supreme commander, but with Congress. To argue otherwise is to grant a military authority (in the person of this supreme commander) supremacy over the duly constituted civilian authority, which is the Congress.[52] This is antithetical to the lawful functioning of our constitutional Republic.

Consider the constitutionality of more limited executive action. It has been suggested that the President's executive powers grant him the right to make executive reprisals without congressional authorization. Although there is some debate as to the legality of reprisals under international law, the decision to make war is constitutionally delegated to the Congress.[53] Relevant to this point is a statement made by Thomas Jefferson:

> The making of a reprisal is a very serious thing . . . it is considered an act of war . . . besides, if the case were important and ripe for that step, Congress must be called to take it, the right of reprisal being expressly lodged with them by the Constitution, and not with the executive.[54]

If the President is not constitutionally empowered to take actions of reprisal, then he certainly cannot, at his sole discretion, commit the nation to war.

If it is claimed that a loose construction of Article II would allow such broad Executive powers, then one would find such a loose structure that the binding breaks and the Constitution falls apart. It is only reasonable to conclude then that the Executive has exceeded its constitutional authority and has usurped Congress' power to engage United States forces in combat. Perhaps sensing the weakness of its arguments, the executive branch of government seeks other grounds to justify its policies.

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52. Velvel, *supra* note 36, at 458.

53. WORMUTH at 31. Falk implicitly accepts the lawfulness of military reprisals when he states: "International Lawyers can contribute greatly to the quality of world order by working out a systematic framework for the assessment of claims to use retaliatory force." Falk, *The Beirut Raid and the International Law of Retaliation*, 63 A.J.I.L. 415, 443 (1969). For an opposite conclusion, *see*, Q. WRIGHT, NON-MILITARY INTERVENTION, THE RELEVANCE OF INTERNATIONAL LAW (1968) at 13, where the author states: "Military reprisals are forbidden by the Charter as made clear by the Suez episode of 1956."

54. J. MOORE, DIGEST OF INTERNATIONAL LAW 123 (1906).

II. THE SEATO TREATY

The executive branch contends that the President's powers under existing treaties (SEATO agreements), governed by Article VI of the Constitution (". . . and all treaties made, or which shall be made, under the authority of the United States shall be the supreme Law of the Land . . .") validate his actions in Vietnam.

President Johnson declared in his State of the Union Message on January 10, 1967:

> We are in South Vietnam because the United States and its allies are committed by the SEATO Treaty to act to meet the common danger of aggression in Southeast Asia.[55]

A commitment is claimed even though three of our fellow signatories of the SEATO Treaty either do not approve of, or have withheld endorsement of the war in either South or North Vietnam.[56]

The relevant phrase of Article IV of the SEATO Treaty, cited in the government arguments, is the phrase affirming the constitutional processes of the participating nations by which each participating nation agreed to "act to meet the common danger in accordance with its constitutional processes." But to view the treaty as grounds for going to war, is to deprive the House of Representatives of its constitutional role. In 1852, Supreme Court Justice McLean stated that:

> A treaty under the federal constituion is said to be the supreme law of the land. This, unquestionably, applies to all treaties, where the treaty-making power, without the aid of Congress, can carry it into effect. It is not, however, and cannot be the supreme law of the land, where the concurrence of Congress is necessary to give it effect.[57]

Further discussion of this question appears in the comments of Justice Story:

> The power of declaring war . . . is in its own nature and effects so critical and calamitous, that it requires the utmost deliberation, and the successive review of all the councils of the nation. . . The cooperation of all the branches of the legislative power ought, upon principle, to be required in this the highest act of legislation, as it is in all great weight with the (constitutional) convention, and to have decided its choice.[58]

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55. As quoted by WORMUTH, at 36.

56. GRUENING AND BEASER at 133.

57. Turner v. American Baptist Missionary Union, 5 McLean 344 (1852), cited in WORMUTH at 38.

58. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 89-90 (ed. 1851), cited in Velvel, *supra* note 36, at 452.

The executive, however, seems to argue that "constitutional processes" allow the President alone to decide whether to go to war. But it has already been shown that Congress alone can constitutionally declare war and at least two court rulings may be cited to support the view that no treaty can override the Constitution.[59] The power to decide whether to fight belongs to Congress. And by approving treaties the Senate has not delegated the war powers to the President. The Senate cannot alone delegate those powers because it is not in the Senate's exclusive domain; it belongs to both the Senate and the House, jointly assembled in Congress.

III. CONGRESSIONAL AUTHORIZATION

A. The Tonkin Gulf Resolution

Another major argument relied upon by the executive is the claim that the Tonkin Gulf Resolution amounts to congressional war authorization. The Resolution is not a declaration of war. Nor was it intended to authorize the huge, massive and enduring conflagration in Vietnam. The language of the Resolution is broad, and indeed, might appear to grant the executive many powers. However, a review of legislative history discloses that Congress did not intend to authorize the President to fight a war as he has done.

Statements by members of both houses of Congress during the debate over the Resolution demonstrate the limited nature of the Congressional intent.[60] It is clear from these statements on the floor of Congress, and from additional testimony pursuant to the Administration's massive escalation of the war,[61] that the spirit or intent of the Joint Resolution was "to prevent the spread of war, rather than to spread it."[62] Typical of the overwhelming sense of the Congress was the statement by Representative Thomas Morgan (D.-Pa.), Chairman of the House Committee on Foreign Affairs:

59. Reid v. Covert, 354 U.S. 1 (1957); Goefrey v. Riggs, 133 U.S. 258 (1890). A recent case stated: "[A]ny Treaty is subject to the Constitution of the United States and any provision of a treaty which purports to take away a right of a citizen, provided by the Constitution, is invalid as to that citizen." Frank Burdell v. Canadian Pacific, 3 IN. LAW. 397 (Cook County Ill. 1968).

60. 112 CONG. REC. 18402-18552, quoted in Velvel, *supra* note 36, at 473-74. Senator Fulbright, in February 1967, had portions of the Tonkin Resolution debate read into the Congressional Record in order to establish the intent of Congress. 113 CONG. REC., Part 4, 4718-20.

61. National Commitment Hearings, 82-94, quoted in Velvel, *supra* note 36, at 475-78.

62. 112 CONG. REC. 18462 (statement of Senator Fulbright); Velvel, *supra* note 36, at 475.

> [The Resolution] is definitely not an advance declaration of war. The committee has been assured by the Secretary of State that the constitutional power of Congress in this respect will continue to be scrupulously observed.[63]

The comments of the two dissenting Senators in claiming war authorization are insignificant in relation to the clearly expressed intentions of the vast majority of Congress.

The intent of Congress must also be viewed in the context of executive assurances, when the Resolution was being considered, that this Resolution would not constitute endorsement of war expansion. The President's message to Congress contains a clause vital to this contextual view: "As I have repeatedly made clear, the United States intends no rashness and seeks no wider war."[64]

To understand further the context in which the Resolution was passed, it is enlightening to recall the dovish campaign statements of President Johnson, one of history's most noted peace candidates.[65] Not since Woodrow Wilson promised to keep us out of war, were there such pre-election assurances that the executive earnestly intended to avoid entrance into war.

Along with those promises came executive assurances that Congress would not be ignored after the enactment of the Resolution. So claimed Secretary Rusk:

> Therefore, if the Southeast Asia situation develops . . . there will continue to be close and continuous consultation between the President and the Congress.[66]

Of course there has not been any declaration of war or Congressional authorization of war since passage of the Resolution. And thus, since 1965, the war "seems so different from the Tonkin context that there is not really ground for drawing the conclusion that legislative authorization was given in the Tonkin Resolution for subsequent war policies of the Executive in Vietnam."[67] Therefore,

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63. 112 CONG. REC. 18539; GRUENING and BEASER at 245.

64. 112 CONG. REC. 18132; Velvel, *supra* note 36, at 473.

65. In a colloquy with Senator Russell, in February 1967, Senator Fulbright explained some of the political machinations affecting the Senate's interpretation of the President's position:

> "I regret that I was not more aware then of the significance of the proposal. I remind the Senator that we were in the midst of a political campaign and there was great public interest in the positions of the two candidates. I confess that I was somewhat partisan in my views at that time, so I was inclined to accept the views of the President without too much criticism." 113 CONG. REC. 4715.

66. *Tonkin Gulf Hearings* as quoted by Velvel, *supra* note 36, at 477.

67. R. FALK, THE SIX LEGAL DIMENSIONS OF THE VIETNAM WAR 38 (1968) [hereinafter cited as FALK]. Falk has even suggested that impeachment proceedings could have been brought against the President for misuse of the Tonkin Resolution:

> I would think that it would have been possible to draw up a presentment of impeachment

Congress did not intend to authorize war by adopting the Resolution. Accordingly, the executive branch cannot find justification for its actions in the Resolution. The following interchange at Senate hearings illuminates that point:

> Fulbright: Wouldn't you agree though in light of that; that (the Resolution) should not be interpreted as an authorization or approval of an unlimited expansion of the war? Rusk: Well, we are not in a position of an unlimited expansion of the war.[68]

For the record, Secretary Rusk's statement in January, 1966, occurred during a period of the Administration's deliberate unlimited expansion of the war.[69]

Despite documentation to the contrary, the Administration nevertheless claims that the Resolution does authorize the President alone to determine to fight the war. If this were true then the Resolution would be unconstitutional, as it would represent a delegation to the President of powers which are exclusively legislative. Congress may not issue such "blank checks" to the executive. According to Chief Justice Marshall:

> It will not be contended, that Congress can delegate to the courts, or to any other tribunals, powers which are strictly and exclusively legislative. . . .[70]

There is similar commentary in *Field v. Clark*:[71]

> That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution.[72]

There is a third reason why the Resolution does not authorize the Vietnam war. That is, even if one accepts the Resolution as sufficient war authorization without questioning the constitutionality of the delegation, the facts of the Tonkin Bay incident and their misrepresentation by the executive branch would invalidate the authorization. The misrepresentation of the alleged attacks in the Gulf

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against the President that relied upon the misuse of the Tonkin resolution, including the impropriety of using the resolution to satisfy the requirements for the balance of power between coordinate branches of government within the United States. *Id.* at 38.

68. THE VIETNAM HEARINGS 47 (Random House, Inc., 1966).

69. E. HERMAN & R. DUBOFF, AMERICAN'S VIETNAM POLICY: THE STRATEGY OF DECEPTION (1966); F. SCHURMAN, P. SCOTT, & R. ZELNIK, THE POLITICS OF ESCALATION IN VIETNAM (1966), cited in WORMUTH, at 61.

70. Wayman v. Southard, 23 U.S. (10 Wheat) 1 (1825).

71. 143 U.S. 649 (1892).

72. *Id.* at 692.

of Tonkin discredits any authorization that might otherwise have existed.[73] There is ample evidence[74] that many of the statements made by Secretary McNamara on August 6, 1964, in presenting the Administration's report of the Tonkin incident, were erroneous.

The McNamara statement called the incident an unprovoked attack on the destroyer Maddox, allegedly on a routine mission in international waters.[75] The statement was untrue. The South Vietnamese had conducted several naval attacks (with American-supplied vessels) in North Vietnam just prior to the alleged attacks on the Maddox.[76] It later developed that the Maddox, far from being on a routine mission, was on a spy mission and its operations took place in the territorial waters of North Vietnam.[77] Also, it later became known that the Administration possessed "contingent drafts" of the future Resolution prior to August, 1964.[78] This evidence is unnerving, amounting to what I. F. Stone called:

> . . . crisis-making to support a secretly pre-arranged decision. Here the war-making power of Congress was clearly usurped by a private cabal in the executive department, which was soon to confront Congress and the country with a fait accompli . . . .[79]

B. Congressional Appropriations

Congressional appropriations of funds for the Vietnam war have been presented by the Legal Advisor to justify the executive's actions. The Legal Advisor has claimed that appropriation acts constitute a clear ratification of executive actions as well as an endorsement for the executive to continue his actions with respect to Vietnam. This theory amounts to giving the President unlimited war powers. Appropriations of food and ammunition to the armed forces during wartime is routine congressional action taken to protect United States citizens under fire. If appropriation acts were a blanket ratification of policy, then the President could merely initiate hostilities, then use the inevitable defense appropriations to claim Congressional war authorization.

> The more blatant the fait accompli which forces Congress' hand, the less should exercise of its power of appropriation be taken as "consent" to the action. Even

73. FALK, at 38-39.
74. ESQUIRE, April 1968, at 60.
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*
79. I.F. STONE, MCNAMARA AND TONKIN BAY: THE UNANSWERED QUESTIONS, THE NEW YORK REVIEW OF BOOKS, Mar. 28, 1968, at 10.

> where there is no fait accompli, if the power over appropriations had been thought a sufficient safeguard against presidential war making, it becomes difficult to understand why the framers were so concerned about withholding the war power from the Executive in the first place.[80]

It is understandable, therefore, that:

> In the Vietnam conflict, members of Congress have refused to allow their votes upon appropriation bills to be interpreted as votes of confidence for the war. They have instead adopted the position that once the troops are in the field, it would be unwise for them—even if they oppose the war—not to approve the appropriations.[81]

In addition, the Supreme Court has stated that an appropriation act does not constitute sufficient Congressional ratification to legitimize dubious executive behavior.[82]

PART THREE: ANALYSIS OF THE ARGUMENTS

I. POWERS OF THE PRESIDENT

A. Historical Precedent

A major issue in this discussion is the interpretation of the Executive's power to make war. There is an implied executive power to order troops into combat when confronted with sudden attack.[83] This power does not validate actions taken in Vietnam. "This war is not the repelling of a 'sudden attack', as the Founding Fathers had in mind when they debated this provision of the Constitution."[84]

It is claimed by the executive branch that history demonstrates the intent of the drafters of the Constitution to grant the President a power to make war—a power different from merely reacting in cases of self-defense. Alternatively, it is argued that history has evidenced an evolution of executive power which today encompasses the ordering

80. *Note, Congress, The President and the Power to Commit Forces to Combat*, 81 HARV. L. REV. 1771, 1801 (1968) [Hereinafter cited as Note].

81. *Comment, The President, The Congress, and the Power to Declare War*, 16 KAN. L. REV. 82, 89 (1967).

82. Greene v. McElroy, 360 U.S. 474 (1959).

83. *Memorandum, supra* note 3, at 485.

84. 133 CONG. REC., part 4, 4716 (Statement by Senator Fulbright). To quote a recent statement by a leading critic of American involvement in Vietnam:

> In the light of this historical background, it is indeed incredible for the Legal Advisor to the Department of State . . . to make the following statement . . . 'Vietnam has a very short political history—one that does not go back even twenty years' (citing Berttinger's description of Nineteenth century pre-colonial history of Vietnam). GRUENING and BEASER, at 36.

of forces into combat without a prior congressional declaration or authorization of war.[85] The Memorandum's assertion of 125 precedents are presented as analogous to the present war. However, most of those instances were either interventions to protect citizens or measured acts of reprisal. Such minor incidents do not stand as precedents for the massive commitment in Vietnam. The position taken by the Legal Advisor is not supported by a reasonable historical analysis.

There is but one (perhaps) viable precedent, not 125, for the military venture in Vietnam—Korea. And one precedent, weak on this same issue of arrogation of power, cannot serve to validate the current actions of the executive. Prior to United States participation in the Korean "police action", the United Nations Security Council authorized enforcement action under its Charter. There was no similar United Nations authorization of United States involvement in Vietnam.[86] Thus, it seems that the employment of historical precedent to evidence a constitutionally derived executive war power does not provide a sound basis to justify the executive's actions with respect to the military involvement in Vietnam.

B. Powers under Article II

The government's argument also rests on the President's powers under Artifle II in three areas: the foreign policy powers, the Chief Executive clause, and the Commander-in-Chief clause, which according to the Legal Advisor grant the President broad war-making powers. Indeed, the Legal Advisor claims that the authority vested in the executive,

85. *Memorandum, supra* note 3, at 485.

86. There are certainly a number of substantial differences between the nature of the Korean war and that of the present cold war conflict: the general acceptance of the American position in respect to international law; the acknowledged legitimacy of the South Korean regime along with the undeniable fact of an armed attack from North Korea; and, most importantly, the sanction of U.S. actions by the United Nations, whose authority seemingly managed to substitute for an appropriate action of Congress. *See* FALK, at 10.

It should also be remembered that the Truman Administration refrained from calling its actions a war, labeling it instead a "police action". No such verbal camouflage has accompanied the current hostilities.

Mr. Pusey in his account of the Korean War argues that President Truman sent American troops into combat even absent *prior* authorization by the United Nations.

> When the fateful presidential decision was made that Monday night, however, the Security Council had merely charged North Korea with a breach of peace, called for the withdrawal of the North Korean forces, and asked for assistance in the execution of that very limited resolution. The appalling fact is that the President plunged the United States into the war without a shred of authority from the Constitution or the laws or treaties and without so much as a request for military help from the United Nations.

M. PUSEY, THE WAY WE GO TO WAR 89 (1969). This article assumes this not to be the case, only for the reason of not further weakening an already weak argument by the Government.

under Article II, is a sufficient grant of constitutional power to authorize the President's war policy. Whether considered together or separately, these three set grants of Presidential power do not amount to an implied war power, as the Memorandum suggests.

There is no disagreement with the general notion that the President is the acknowledged leader of the nation in the realm of foreign policy. In this role, he directs the United States' international relations.[87] The broad interpretation of presidential foreign policy powers would emphasize the importance of maintaining one spokesman in foreign affairs. Presidential supremacy in diplomatic matters has far-reaching effects. Nevertheless, the limitations of the Constitution prevent dictatorial powers in the executive.

> [T]he importance of retaining one spokesman for the nation should not develop into one decision-maker who commits the nation to a limited war. It is more important that the United States, if it places itself and the world upon the brink of nuclear war, should make that decision in some democratically-republican manner.[88]

The President is not the sole judge in matters of war.

> But though the initiative in shaping foreign policy rests with the President, the power to implement that policy through the actual employment of the military theoretically still remains with Congress, wherever such employment would amount to making "war".[89]

The Chief Executive clause of the Constitution places no legislative powers in that office. The contention that Congress has significantly delegated legislative powers to the President, including the power to declare war, bears no merit at all. The *Youngstown* decision treats extensively the question of executive infringement into legislative affairs.[90] The Court there held that the President may execute acts passed by Congress, but he may not usurp powers clearly in the legislative domain. The *Youngstown* decision, therefore, provides ample authority for dismissing the governments' contention that the congressional war power has been delegated to the President.

87. In his direction of foreign policy, it is desired that the President's actions coincide with established norms of international law in the policy-making process. It should guide the Executive as a "framework of restraint". *See* FALK, at 4-21.

88. Comment, *supra* note 81 at 96.

89. Note, *supra* note 80, at 1777.

90. 343 U.S. 579 (1952). In the Youngstown litigation: "Government attorneys answered with appeals to the necessities of national defense. They also laid claims to unlimited, 'inherent' presidential powers. The President, himself, repudiated these claims. The Court, however, was infuriated by them." NEUSTADT, PRESIDENTIAL POWER 27-28 (1964).

The broadest claims of executive war-making powers rest on the President's role as Commander-in-Chief. The Commander-in-Chief clause, however, cannot be interpreted as constitutional authorization for the executive to commit the nation to war.

> The President is to be Commander-in-Chief of the army and navy of the United States. In this respect, his authority would be nominally the same with that of the king of Great Britain, but in substance, much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces as first General and admiral of the confederacy; while that of the British king extends to the declaring of war and to the raising and regulating of fleets and armies, all of which, the Constitution under consideration, would appertain to the legislature.[91]

The Legal Advisor, however, contends that there has been an historical evolution of presidential war power. The Memorandum asserts that the Commander-in-Chief has ultimate responsibility to maintain national security.[92] The argument continues: complexity of cold war technology presents a condition of extreme urgency; with the added necessity of secrecy, the Commander-in-Chief's role transcends its traditional constitutional limitations. This argument finds no support in the facts surrounding the Vietnam conflict. The argument, therefore, fails.

> None of the recent military actions appears to have involved such genuine urgency as to preclude Congressional participation in the decision to employ the military. Even fewer should be the cases where the demands of secrecy preclude resort to Congress.[93]

Thus, the clear constitutional mandate restricts the powers of the President in this instance. In accordance with traditional constitutional principles, the decision of whether to go to war belongs with Congress.

> . . . after the initial decision, the President (as Commander-in-Chief) is relatively free to make the necessary tactical decisions, but in a democratic republic the people's representatives should play a decisive part in the initial decision to become committed.[94]

II. THE SEATO TREATY

The major premise of the government's argument, that authorization for the government's position can be found in the SEATO Treaty, is found in Article VI of the Constitution, which affords treaties the

91. A. HAMILTON, J. JAY, & J. MADISON, FEDERALIST PAPER 69 (Scribner's ed. 1921) at 250.

92. *Memorandum*, *supra* note 3, at 484.

93. Note, *supra* note 80, at 1797.

94. Comment, *supra* note 81, at 95.

status of supreme law of the land. The argument is that the President is permitted by treaties to do an act that would be unconstitutional but for the treaty.[95] Leaving aside the question of what the SEATO Treaty obligations specifically are, one ought to consider the nature of this supreme law and its relation to constitutional processes.

In the course of his defense of the Administration's position, Stefan Possony presented an excellent analysis of this question with reference to the United Nations Charter. The analysis readily applies to the SEATO Treaty:

> The Constitution leaves open the question of whether the Constitution or the treaties are the "supreme law" of the land. But since the status of a treaty in the United States is dependent upon the Constitution and not vice versa; since treaties must be compatible with the Constitution while adjustments of the Constitution to a treaty would require Constitutional amendment; since treaties are to be executed in accordance with constitutional provisions; since treaties operate for a time and even treaties without expiration dates can be cancelled, whereas the Constitution can only be amended, and this with great difficulty; and since no provision exists in the . . . (Treaty) asserting supremacy over constitutions, it follows that the U.S. Constitution is the truly supreme law of the land.[96]

A treaty, although ratified by the Senate, cannot in any way alter the Constitution. The Constitution stipulates that only Congress—not a combination of the President and the Senate—has the power to declare war. A treaty may be the supreme law only where it does not interfere with the Constitution. The Supreme Court agreed:

> It need hardly be said that a treaty cannot change the Constitution or be held valid if it be in violation of that instrument. This results from the natural and fundamental principles of our government.[97]

The constitutional powers of the President, combined with the SEATO Treaty, do not validate the executive's Vietnamese war policy. Only Congress can authorize that policy.

III. CONGRESSIONAL AUTHORIZATION

The Tonkin Gulf Resolution is the single most vital document in issue

95. It is notable that the man who is now the chief of the Pentagon, Secretary of Defense Melvin Laird, is on record publicly disapproving the Administration position. In 1966, then Congressman Laird declared that the SEATO Treaty was "not a commitment to send American troops to fight in Southeast Asia. It carefully avoided the kind of automatic response to agression embodied in the NATO agreement. . . ." 112 CONG. REC. 5558 (1966), quoted in Standard, *U.S. Intervention in Vietnam is not Legal*, 52 A.B.A.J. 627, 632 (1966).

96. S. POSSONY, AGGRESSION AND SELF DEFENSE: THE LEGALITY OF U.S. ACTION IN SOUTH VIETNAM 98-99 (1966).

97. The Cherokee Tobacco, 78 U.S. 616, 620 (1870).

in the debate over the constitutionality of the Vietnam war. If the executive's actions are constitutional at all it is because of Congressional authorization. All of the other arguments have been shown to be spurious. The fundamental constitutional proposition that only Congress can bring the nation to war is tested by this Resolution and its effect on history and law.

For if constitutional authorization for the war was granted to the President, it occurred with the Resolution. Thus, the focal point of the entire debate is one of history's most controversial events: the Tonkin Bay incident; the passage of the Resolution, its meaning, and its aftermath.

A. The Tonkin Gulf Resolution

The Administration contends that the Joint Resolution can be interpreted broadly. The Resolution is presented as a deliberate delegation of the Congressional war power. It is stated that the Resolution is written in clear language which grants power to the President without specifically limiting his options. This is true. It is also true that the Resolution passed in the House and Senate by a nearly unanimous vote. These facts seem to support the argument that the executive has been granted sufficient congressional war authorization. These facts though are quite illusory, for the major assumptions underlying them are questionable.

The first assumption, of course, is that the official version of the naval incidents in the Gulf of Tonkin is accurate. The second assumption is that Congress knowingly and deliberately passed a resolution considered tantamount to a declaration of war. A third key assumption is that the action of Congress in delegating power to declare war to the President is constitutionally permissible. Each assumption is of questionable validity. Criticism of each forms the basis for three assaults on the Tonkin Resolution included in the rebuttal. Each critique, presented in different order from the premises, must be considered on its own merit.

The first argument deals with the nature of congressional intent. Did the members of Congress intend, with their votes on the Resolution, to authorize the President to go to war as he did? Was there present in the Congress a real consciousness that their votes could later be interpreted as an endorsement of massive, open-ended war escalation?[98] The evidence points toward a negative answer.

98. "The point here is that the Senate did not by the Tonkin resolution authorize subsequent executive policy. This point is rather important because of the effort of the Executive

The contextual approach used to build this argument is based on three factors. First, any reasonable appraisal of the entire legislative history demonstrates a decided lack of hawkish, pro-war sentiments in Congress. It appears that the overwhelming sense of the Congress was that the Resolution was in no way similar to a declaration of war. Second, the President's message to Congress, though typically ambiguous, was anything but a determined battle cry. No President in history ever asked Congress for a declaration of war, or its equivalent, with the assurance that he sought no wider war. And finally the political climate of 1964 was not hawkish. The vast majority of the American people accepted Lyndon Johnson as a man of peace, and so did the Congress. Accordingly, the Resolution was not intended to send the President on the warpath.

> It would seem that the action of Congress under the conditions that prevailed when the Tonkin Resolution was submitted, constitutes, at most, an ultimatum and not a declaration of war.[99]

Assuming that the Tonkin Resolution was intended as the delegation of the war power to the executive, the question whether that delegation was constitutionally valid must be dealt with. Senator Morse took the following view in speaking against adoption of the Resolution:

> It does not say he (the President) is limited in regard to the sending of ground forces. It does not limit that authority. That is why I have called it a predated declaration of war, in clear violation of Article I, Section 8 of the Constitution, which vests the power to declare war in the Congress, and not in the President.[100]

Senator Morse, therefore, opposed the Resolution on the grounds that it constituted a blanket delegation of the war power without any limiting standards. Such a broad delegation of congressional power cannot be constitutionally valid. Supported by the Court rulings cited in the rebuttal, this argument raises very serious questions about the validity of the congressional authorization claimed by the executive.

Finally, the question whether the Resolution was based on accurate information arises. It is argued that it was not. Inaccuracies and omissions in the Administration's report to Congress severely

to rely on the Tonkin resolution in response to critics in the Senate, especially those who alleged a failure to secure adequate legislative authorization for carrying the Vietnam war to its later stages." FALK, at 38.

99. Standard, *U.S. Intervention in Vietnam is not Legal*, 52 A.B.A.J. 627, 633 (1966).

100. 110 CONG. REC. 18426-27, quoted in *Memorandum, supra* note 3, at 1105.

weaken and perhaps destroy the legitimacy of any authorization in the Resolution.

> There is evidence, originally brought to public attention by the columnist I.F. Stone, and later confirmed in Senate hearings held during February, 1968, that suggests that the executive branch distorted the Tonkin incidents to secure from the Senate the authorization it received for a war buildup . . . and there was a failure to disclose the rising executive branch intention, independent of the Tonkin Incident, to extend the war to North Vietnam.[101]

The effect was "to discredit whatever authorization was given the executive by the Tonkin Resolution. . . ."[102]

In the light of these arguments, it is evident that the executive branch has no real basis for citing the Tonkin Gulf Resolution as significant authorization for the President's actions in Vietnam.[103]

B. Congressional Appropriations

An appropriation act does not constitute approval or ratification of executive war policy. Senator Richard Russell, Floor Manager for the Supplemental Appropriations Bill, in his opening statement presenting the bill, on February 16, 1966, assured his colleagues that the appropriation act would in no way constitute an endorsement of past or future policy:

> It is important that the Senate and the Nation clearly recognize this bill for what it is: an authorization of defense appropriations. It could not properly be considered as determining foreign policy, as ratifying decisions made in the past, or as endorsing new commitments.[104]

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101. FALK, at 38. "However, the policy was also adopted to play down the decision to escalate. This was done with consummate public relations skill, even as an experienced magician diverts the attention of the audience away from where the action is taking place." GRUENING and BEASER, at 240.

102. FALK, at 39.

> The omissions and distortions of fact during the 1964 hearings were so frequent, so skillful, that one must suspect something more sinister than honest misunderstanding of accidental verbal vagueness. . . . But to suspect is not to convict: The weight of the evidence presented in these pages is that the Administration acted hastily, upon incomplete and misleading information, and then refused to admit error . . . Deception is deception, be it deliberate or unwitting, and the facts warrant conviction of the Johnson Administration on this count—both for its recitation of the 'facts' of the August 4 incident to Congress in 1964, and for its use thereafter of the Tonkin Gulf Resolution.

J. GOULDEN, TRUTH IS THE FIRST CASUALTY—THE GULF OF TONKIN AFFAIR (1969).

103. "In short, a war has been waged upon the orders and judgment of the President and his advisers with only a token resolution of support by Congress which had no Constitutional effect whatsoever". Comment, *supra* note 81, at 87. *See also*, J. GOULDEN, TRUTH IS THE FIRST CASUALTY—THE GULF OF TONKIN AFFAIR (1969).

104. GRUENING and BEASER, at 315. Senator Russell was the recognized Johnson Administration spokesman in the Senate as Chairman of the Armed Services Committee, and later chairman of the Appropriations Committee; since the 91st Congress he has been President

The fait accompli description of the appropriation act, as stated in the rebuttal arguments, rather persuasively destroys the Memorandum's position on that issue. A famous historical incident demonstrates the folly of any reliance on appropriations to check the policy of the executive. One remembers the arrogance of President Theodore Roosevelt, who sent the "Great White Fleet" across the oceans, leaving Congress no choice but to pay for its safe return. This case pales in comparison to actual wartime appropriations. To arm and feed men in battle is so compelling a need as to negate any authorization from such legislative measures.

The executive's contention that appropriations constitute substantial congressional support for the administration fails. Returning to Professor Falk's analysis:

> The present level of legislative participation involving mainly the power to disapprove budgetary recommendations and withhold appropriations from the executive is very inadequate. The typical congressional perception of this choice is one of withholding support from Americans on the battlefield confronted with threats directed at their lives. There is in this sense no real determination as to whether the waging of the war is itself in the interests of the United States.[105]

IV. Senate Debates—NATO Treaty and United Nations Charter

An analysis of the 1949 debates in the Senate relating to the ratification of the North Atlantic Defense Pact and the debates subsequent to President Truman's sending of troops to Europe in 1951 gives significant insight into the congressional attitudes towards the war-making power of the executive. The issue of the legality of the executive to deploy troops to sensitive areas is an issue that has not been often considered by either politicians or scholars in the debate concerning the legality of the United States' military involvement in Vietnam. This question should at least be identified in its legal-historical context. For if the President does not have the power to order troops into sensitive areas, then it is more difficult to argue that he has the power to order troops into combat without prior congressional consent.

Senator Connaly, a strong proponent of the NATO Treaty, stated during the 1949 debates:

> Not only must we ratify the treaty by constitutional processes, but it will be

Pro Tempore of the Senate. It is yet unclear who has assumed the role as spokesman in the Senate for the Nixon Administration.

105. Falk, at 33.

> carried out under the provisions of the Constitution of the United States. The full authority of the United States to declare war, with all discretion that power implies, remains unimpaired.[106]

Senator Smith of New Jersey perhaps best summed up the feelings of the Senate, that even the Senators that supported the Treaty did not believe that the Treaty enlarged the President's war-making power:

> Mr. President, what I am trying to bring out is my insistence, as one who favors unconditionally the North Atlantic Treaty, and urges its ratification, that I am not in any way, shape, or manner bound by any commitment for a military program of which I may not be able to approve . . . .[107]

The Senate Foreign Relations Committee submitted a report to the Senate when the committee brought forth the NATO Treaty for discussion. The report raised important questions as to the President's war-making powers.

> Would the United States be obligated to react to an attack on Paris or Copenhagen in the same way it would react to an attack on New York City? In such event does the treaty give the President the power to take any action, without specific congressional authorization, which he could not take in absence of the treaty? The answer is 'no'.[108]

The report further stated,

> The decision as to what action was necessary, and the action itself, would of course have to be taken in accordance with the established constitutional procedures as the treaty Article 11 expressly requires.[109]

Senator Watkins submitted a reservation to the Senate in order to further clarify the obligations assumed by the United States under the NATO Treaty. The reservation stated that the United States understands and construes Article 5 of the Treaty as follows:

> That the United States assumes no obligation to restore and maintain the security of the North Atlantic area or to assist any other party or parties in said area, by armed force, or to employ the military, air, or naval forces of the United States under Article V or any article of the treaty, for any purpose, unless in any particular case the Congress, which under the Constitution has the sole power to declare war or authorize the employment of the military, air, or naval forces of the United States, shall by act or joint resolution so provide.[110]

Senator Watkins' reservation was defeated 8-87. The primary

106. 95 CONG. REC. 8815 (1949).
107. *Id.* at 9192.
108. *Id.* at 9820.
109. *Id.*
110. *Id.* at 9915.

reason for its defeat was the consistent reassurances given the Senators by the Administration and by pro-Administration Senators that congressional war-making powers were not threatened in any way by the NATO Treaty.[111]

The debates over the ratification of the NATO Treaty clearly show that even the Senators that supported the ratification of the Treaty never considered that the Treaty enlarged the war-making powers of the President. They never considered that the President under the NATO Treaty had the authority to order United States troops into combat, absent congressional consent or a direct attack upon the United States. This question was reconsidered the following year, as was the question of the authority of the President to deploy troops, when President Truman ordered troops to Europe under the claim that the NATO Treaty empowered him to do so.

President Truman ordered troops to Europe without the consent of Congress almost immediately after the ratification of the NATO Treaty. This was a move intended to enhance the credibility of the United States commitment to defend Europe in light of Communist aggression in Korea. The reaction in Congress was extremely critical. Senator Wherry introduced Senate Resolution 8 which stated:

> That it is the sense of the Senate that no ground forces should be assigned to duty in the European area for purposes of the North Atlantic Treaty pending formulation of a policy with respect thereto by Congress.[112]

Senator Wherry stated:

> The President's announced course is in direct conflict with the procedures prescribed in the North Atlantic Treaty. If the President alone decides what the character of mutual aid and self-help is to be, then the Congress becomes a rubber stamp to finance the President's commitments.[113]

Senator Ferguson argued that the right to deploy troops, let alone to order them into combat, is not a question that can be considered closed to discussion.

> Despite the number of occasions on which the President has sent American forces overseas without a declaration of war or other specific congressional authority, the Supreme Court has never ruled as to the constitutionality of any of such actions. . . . The legality of such acts in time of peace remains open to question. . . . On these precedents . . . the question of constitutionality as it relates to the power of the President to send American forces overseas, without

111. *Id.* at 9916.
112. 97 CONG. REC. 320 (1951).
113. *Id.* at 325.

> a declaration of war or other congressional authorization, must remain open. . . .[114]

The Senate debated the issue of deployment of troops in the context of the NATO Treaty and concluded the President's authority in deploying troops to areas outside of the United States is not a closed question and that the President's war-making power was not intended to be increased by the ratification of the NATO Treaty. The Senate decided to involve the United States in the defense of Western Europe, but not to increase the power of the President. A central concern that kept the United States from joining the League of Nations by ratifying the Versailles Treaty in the 1920's was the fear of involving the United States in a war absent the consent of Congress. The Senators when signing the NATO Defense Pact believed that they had overcome the probability of such an event. Similar conclusions can be made by investigating the actions of the Senate in approving the United Nations Charter and the United States involvement in the United Nations first collective security action—Korea.

Mr. Merlo Pusey in his recent work on the President's war-making powers has concluded:

> To avoid any possibility of the President acting alone (under the Charter), Congress hastened to pass, only a few weeks after the Charter became operative, the United Nations Participation Act. Section Six of that act authorized the President[115] (to conclude agreements with the United Nations to make available military forces). But the Congress did not trust the President . . . (and) provided in specific terms that the agreements negotiated with the Security Council be 'subject to the approval of Congress by appropriate Act or Joint resolution.' By this enactment Congress demanded a full partnership with the White House in determining how the United States should meet its U.N. military obligations. . . . Congress was trying to close the door against the commitment of any military forces to United Nations duty by Presidential action, without legislative consent.[116]

If the President was not to have authority to deploy troops or order troops into combat under the Charter Article 43 scheme, without congressional consent, then to argue that the President has similar authority under the Security Council's power to request aid in effectuating enforcement actions is very dubious. President Truman ordered American troops into combat in Korea without prior authorization from Congress. The State Department alleges this as valid precedent for the United States' action in Vietnam. This

114. *Id.* at 524, 527.
115. M. PUSEY, at 79.
116. *Id.* at 80-81.

allegation is certainly questionable on the strength of the above arguments, but even more so when one considers the factual differences in the nature of the attacks under question.

In light of the United Nations Participtions Act, and the understanding that the Senate demonstrated as to the effect of the NATO Defense Pact, the right of the President to order troops into combat or to deploy them in Southeast Asia without congressional consent is not disposed of by citing the Korean conflict. Professor Arnold Wolfers has argued that, "The action taken by the United Nations in 1950 to halt the attack on South Korea has been heralded as the first experiment in collective security," but in fact has only been an exercise of 'collective defense' by Western powers.[117] The Congress' explicit limitation in the United Nations' Participation Act, and its severe rebuff of the President in 1951, is clear evidence that Congress never intended the President to have an unlimited power to deploy troops or to order them into combat, absent explicit Congressional consent.

V. SUMMARY

All major points of contention on the question of constitutionality of the Vietnam war have been considered. It has been determined that the executive is not operating within the limits of the Constitution. In review of the analysis, the following conclusions have been reached: 1) the executive powers under Article II of the Constitution do not authorize the President's Vietnam war policy without congressional authorization; 2) the SEATO Treaty does not commit the United States to act without adhering to its constitutional processes, which clearly stipulate that the power to declare war resides in the Congress; and 3) the actions of Congress alluded to in the Memorandum, which ere the Tonkin Gulf Resolution and the subsequent congressional appropriations, do not constitute sufficient authorization or ratification of the President's decision to commit the nation to war in Vietnam.

In other words, there has been no historical evolution of the war-making power, no congressional delegation of the war-making power to the President, and no congressional approval of the actions of the President. The history of the NATO debates and congressional actions with respect to the United Nations Charter do not support the arguments of the Legal Advisor. The Korean experience is not a valid precedent for United States involvement in Vietnam. The continuing

117. Wolfers, *Collective Security and the War in Korea*, 43 YALE L. J. 482 (1954).

military intervention in Vietnam amounts to an executive war, in violation of Article I, Section 8 of the United States Constitution.

Before concluding this summary, it is interesting to look at the testimony from the Senate's Vietnam hearings in January, 1966. The following dialogue is between Senator Wayne Morse (D.-Ore.) and former Ambassador George F. Kennan:

> Morse: Are you at all disturbed or concerned about the fact that Article I, Section 8, of the Constitution hasn't been complied with by the President and by the Congress? . . . Does it concern you that we have boys dying in South Vietnam, in a war which I have called an "executive war", without a declaration of war?
> Kennan: It has puzzled me and the whole situation has concerned me.
> Morse: . . . Don't you think it is about time we make up our minds whether or not we are going to legalize this war by going through our Constitutional processes?
> Kennan: Yes, Senator, I think we have a fundamental decision to make . . . .[118]

The reasoning of the executive branch would deny that fundamental decision to the American people and to the Congress. With its perversion of the Constitution and its inclination to disinvent history, the Memorandum must stand as a classic example of a legal document which is consistently fallacious.

CONCLUSION

The finding that the Vietnam conflict is an executive war places in doubt the status of constitutional processes in the United States. It is a matter requiring a remedy in the form of either judicial review or a reassertion by the legislative branch of the necessity of maintaining the separation of powers doctrine as a functioning, as well as a theoretical, constitutional principle. Neither the judiciary nor Congress has acted on the failure of the executive branch to respect the Constitution.

> The consequences of this failure to observe the Constitution are all too evident. True, no Supreme Court decision has adjudged the war in Vietnam as unconstitutional on the grounds that Congress adopted no formal declaration of war and because the Senate gave no effective advice and consent. Instead, the declaration of unconstitutionality has come from the judgment of the people. We see the decree everywhere. For the first time in our memory, an incumbent President was forced from office. Young men whose fathers and brothers volunteered to serve their country now desert to Canada and Scandinavia rather than bear arms for the country's cause. Thousands march on Washington and picket the White House, the Capitol, and the Pentagon . . . .
> . . . And I cannot shake the feeling that ultimately the reason so many are now

118. THE VIETNAM HEARINGS 157-59 (Random House, Inc., 1966).

disrespectful and unresponsive to authority is because authority was disrespectful and unresponsive to the Constitution in the making of our policy in Vietnam.[119]

I. RESPONSE TO A CONSTITUTIONAL CRISIS

This continuing congressional-executive dilemma amounts to a constitutional crisis. Accordingly, there is a critical urgency to re-evaluate the role of the courts and the Congress.

A. Judicial Review

Under John Marshall, the Supreme Court established the principle of judicial review. The Court has assumed the responsibility to rule on dubious actions of the executive and the legislative branches. One might expect that the bench could review the executive war policy as constitutional issues of war and peace. But, the federal judiciary has refrained from hearing those cases on the ground that political questions are involved. Perhaps, too, the courts are wary of the prospect of a conflict with the executive.[120]

Legal objections to the war have uniformly been denied adjudication. In one important case, however, *Mora v. McNamara*,[121] two Justices seriously confronted the questions in dissenting opinions. In his dissent, Justice Stewart summarized some of the lingering constitutional questions:

> I. Is the present United States military activity a 'war' within the meaning of Article I, Section 8, clause 11, of the Constitution?
> II. If so, may the executive constitutionally order the petitioners to participate in that military activity, when no war has been declared by the Congress?
> III. Of what relevance to Question II are the present treaty obligations of the United States?
> IV: Of what relevance to Question II is the Joint Congressional ("Tonkin Bay") Resolution of August 10, 1964?
> (a) Do present United States military operations fall within the terms of the Joint Resolution?
> (b) If the Resolution purports to give the Chief Executive authority to commit the United States to armed conflict limited in scope only by his own absolute discretion, is the Resolution a constitutionally impermissible delegation of all or part of Congress' power to declare war?[122]

Justice Stewart, along with Justice Douglas, argued persuasively for the granting of certiorari; but the majority of the Court was not

119. 115 CONG. REC. 7125 (Statements of Senator Ervin) (daily ed. June 25, 1969).
120. Note, *supra* note 80, at 1794.
121. 389 U.S. 934 (1967).
122. *Id.* at 935.

persuaded. In the vacuum of judicial review, the executive war in Vietnam constitutes nothing less grave than a constitutional crises.[123]

B. Congressional Re-evaluation

Once it is determined that the Constitution requires congressional participation in the decision to make war, one must interpret the nature of Congress' responsibilities. Many persons, while still supporting the maintenance of the congressional war powers, consider declaration of war to be undesirable.[124] Certainly, declaration of war is incompatible with the objectives of restricting the actions of the executive. This measure "might have expanded the war without putting a brake on executive discretion."[125]

There is also a belief that formal declaration of war is not the only means of congressional war authorization. It is contended that "the Constitution does not insist on any rigid formalism. It gives Congress a choice of ways in which to exercise its power."[126] If that choice exists it has not been discovered during the course of the present war. And if indeed the declaration of war is deemed undesirable, a viable substitute method must be found to implement Congress' authority in the war-making process.[127]

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123. For a comprehensive discussion of the problems of justiciability *see*, Schwartz and McCormack, *The Justiciability of Legal Objections to the American Military Effort in Vietnam*, 46 TEX. L. REV. 1033 (1968). The authors urge a positive response from the courts to this constitutional crisis: "What is really at stake is the viability of our constitutional system. . . . Otherwise, the claim that the rule of law (at least in cases that matter very much) is a rationalization of result rather than a reasoned basis of decision, and therefore entitled to little respect, must be honored." *Id.* at 1053.

124. There is some agreement, from sources that support and oppose the government's position, that the declaration of war may be undesirable in the Vietnam war. *See* HULL and NOVOGROD, at 175; FALK, at 36-37.

125. FALK, at 36. In particular, he states such an action might: 1) erase the limited military objectives, thus undermining efforts for negotiation; 2) it could confer additional, emergency powers on the President and; 3) it could possibly effect collective security agreements bringing the major Communist powers into a dangerous confrontation with the United States.

126. *Memorandum, supra* note 30, at 485. One historical account cites a choice: "Since that time (the war with France) the use of the resolution, especially in recent years, has become the predominant means by which congressional participation in the decision to commit troops to combat has been sought." Note, *supra* note 80, at 1802. This source fails to support that statement with any instances of combat authorized by a Congressional resolution. Unlike the Memorandum, the Tonkin Resolution is not purported, in that account, to constitute congressional authorization for the Vietnam war.

127. "It seems clear that the present dichotomy between according Congress virtually no role and an insistence on a declaration of war is far too rigid to provide for meaningful legislative participation in the policy-forming process relevant to war-peace problems." FALK, at 15. It should be emphasized that the debates involving the adoption of the United Nations Charter and the North Atlantic Treaty were similar to the debates concerning the constitutionality of United States' actions in Vietnam.

This constitutional difficulty seems to demand a new approach to the relation between the executive and legislative branches. The testimony of Professor Henry Steele Commager before Senate hearings describes the notion of such re-evaluation:

> What we can say, and I think must say, is that there must be a reconsideration of the relationship of the Executive and the Legislative branches, particularly the Executive and the Senate in the conduct of foreign relations . . . both branches of the government should, I think, search their souls, search the law, search history, and develop the resources of joint programs and joint policies, rather than the situation which now confronts us.[128]

One writer has proposed an alternative to the present dilemma in order to regain a balance in the separation of powers. Legislation would be implemented to retain the congressional power in the context of current cold war conflicts. This legislation would require close cooperation between the executive and legislative branches in the decision-making process. The plan calls for stringent congressional scrutiny of executive actions, and a limitation in its authorization. There is also to be mandatory congressional review of its authorization at regular intervals, with strict adherence to the limitations of military commitment. No further escalation could occur without deliberate and definite expression of the will of Congress.[129]

II. Implications of the Constitutional Crisis

A thorough discussion has been presented of relevant constitutional provisions and their relationship to the principle of separation of powers. It appears that these elements of the Constitution, however just and sound, now exist largely in theory. The executive actions now amount to the de facto power to make war.[130] The concerned individual must wonder about the status of the Constitution and of republican

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> The Charter of the United Nations . . . (and) its acceptance did not mean that Congress was willing to relinquish the war power to a President acting under provisions of the Charter . . . [T]he Congress demanded a full partnership with the White House in determining how the United States should meet its U.N. military obligations. . . . It wrote into the Participation Act a provision that 'nothing herein contained shall be construed as an authorization to the President by the Congress to make available to the Security Council . . . armed forces, facilities, or assitance in addition to the forces, facilities, and assistance provided for in such special agreement or agreements.' . . . The Senate again manifested its determination to retain a voice in military commitments that might lead to war when it approved the North Atlantic Treaty.

Pusey, at 79, 80-82.

128. 113 Cong. Rec. 4715 (1967).

129. *See*, Comment, *supra* note 81, at 91-97.

130. *Id.* at 89.

government in the United States. Many members of the Congress have expressed their concern over the national predicament. State Hearings on National Commitments[131] have produced much awareness of the gravity of this problem. The National Commitments Report put it this way:

> The executive, by acquiring the authority to commit the country to war, now exercises something approaching absolute power over the life and death of every living American. . . . Recognizing the impossibility of assuring the wise exercise of power by any one man or institution, the American Constitution divided that power among many men and several institutions. . . . The concentration in the hands of the President of virtually unlimited authority over matters of war and peace has all but removed the limits to executive power in the most important single area of our national life. Until they are restored, the American people will be threatened with tyranny or disaster.[132]

Discussion continues in Congress, led by the Senate Foreign Relations Committee. In June, 1969, its chairman, Senator Fulbright, successfully sponsored a resolution on national commitments. The resolution, which passed the Senate by a huge majority, reasserts the Constitutional role of Congress in the realm of national commitments.[133] But as Senator Ervin stated, the resolution does not "fulfil that constitutional responsibility. It merely testifies to an awareness of it that had been lost for far too long."[134]

Although the awareness has been regained by the Senate, its constitutional powers are still at large. Events soon demonstrated the ineffectiveness of such rhetoric. A new conflict between the executive and the Senate over national commitments emerged that same summer (August, 1969). A secret military agreement with Thailand, previously unknown to the Senate, was disclosed. Members of the Senate were furious, as for some time the Pentagon refused to reveal the full extent of the executive's commitment. It finally became known that theThai

131. *Hearings before the Senate Committee on Foreign Relations on National Commitments*, 90th Congress, 1st Session (1967).

132. S.R. 797 (National Commitments Report), 90th Congress, 1st Session 26-27 (1967).

133. The vote on the resolution was 70-16. It reads, as amended by Senator Cooper:

> Resolved, that (1) a national commitment for the purpose of this resolution means the use of the armed forces of the United States, on foreign territory, or a promise to assist a foreign country, government, or people by the use of the armed forces or financial resources of the United States, either immediately or upon the happening of certain events, and (2) it is the sense of the Senate that a national commitment by the United States results only from affirmative action taken by the executive and legislative branches of the United States Government by means of a treaty, statute, or concurrent resolution of both Houses of Congress specifically providing for such commitment.

Senate Resolution 85 on national commitments, 115 CONG. REC 7153 (daily ed., June 25, 1969).

134. 115 CONG. REC. 7125 (daily ed. June 25, 1969) (remarks of Senator Ervin).

agreement provided for the employment of American armed forces, under Thai command, with the approval required of the President but not of the Congress.[135] This type of commitment is viewed here as unconstitutional.

In the Senate debate over the National Commitments resolution the main topic was the nature and exercise of executive power. Senator Hartke contributed an interesting observation:

> During the Glassboro summit, several commentators and the State Department cautioned the public not to expect too much from the summit because Mr. Kosygin, representing the Soviet Union, did not have the same authority to commit his country that President Johnson had. Apparently, few were aware of the irony that the representative of the most popular based government had more personal power than the representative of an autocratic and monlithic government.[136]

Perhaps the Senator's description of a "popular based government" is meant as a sarcastic allusion to the terrible excesses of the power of the executive. It must be agreed that as long as these powers continue to remain unchecked, "the American people will be threatened with tyranny or disaster."[137] And in conclusion, Mr. Merlo Pusey has stated: "If Congress will not authorize a war, limited or full-fledged, after reasonably full knowledge of the facts and sober deliberations, the American people should not be in it. Our first and largest constitutional obligation in the late sixties is to move toward restoration of that principle."[138]

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135. Kenworthy, The New York Times, August 17, 1969.

136. 115 CONG. REC. 7132 (daily ed. June 25, 1969) (remarks of Senator Hartke).

137. Note 13, *supra* at 27. The recent Vietnam debate has given added strength to the arguments of constitutional scholars that separation of powers has led to the rule of the few over the many. Professor William H. Riker has stated:

> We are trying to operate with democratic methods inside a constitutional system which is designed to impede them. And so the great problem of American democrats is to refashion their institutions to compromise for the separation of powers. . . . [F]ull representative democracy and the abandonment of the separation of powers go hand in hand. . . .

W. RIKER, DEMOCRACY IN THE UNITED STATES 149 (1965).

138. M. PUSEY, THE WAY WE GO TO WAR 190 (1969).